No. 83-1333

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

AMERICAN DREDGING COMPANY,

Petitioner,

against

BERKLEY CURTIS BAY CO., INC. and
MORAN TOWING & TRANSPORTATION CO., INC.,

Respondents.

PETITION OF AMERICAN DREDGING COMPANY FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Questions Presented

1) May the lower courts, which are bound by Rule 54(c) Fed. R. Civ. P., deprive a prevailing party of judgment on a claim which was included in the pleadings, the pre-trial order, the trial brief, and thereafter proved at trial.

2) Whether the *ex delicto* rule in towing damage cases under *Stevens* v. *The White City*, 285 U.S. 195 (1932), followed in the First, Fifth and Eighth Circuits should be replaced by the *ex contractu* rule under breach of warranty principles, which is in effect in the Second, Fourth and Ninth Circuits.

3) Should the rule of damages in proportion to fault under *United States* v. *Reliable Transfer Co., Inc.*, 421 U.S. 397 (1975), be extended to contractual breach of warranty actions.

American Dredging Company is a publicly held corporation with no subsidiaries and no parent company.

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PETITION OF AMERICAN DREDGING COMPANY FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

American Dredging Company petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit entered in this case.

Opinions Below

The opinion of the Court of Appeals entered on November 21, 1983 is unreported. The opinion of the District Court, dated February 11, 1983 is reported at 557 F. Supp. 335 (S.D.N.Y. 1983). The opinions of the Court of Appeals dated June 28, 1982 and September 3, 1982 are reported in 1982 A.M.C. 2311, and 1982 A.M.C. 3285. The opinion of the District Court dated November 10, 1981 is unreported. The opinions are reprinted in the Appendix.

Jurisdiction

The opinion of the court of appeals was entered on November 21, 1983. No rehearing was sought. The jurisdiction of this court is invoked pursuant to 28 U.S.C. §1254(1).

Statutory Provisions Involved

28 U.S.C., Rule 54(c) Fed. R. Civ. P.

Statement of the Case

The Factual Background

This case involves the sinking and loss of the dredge *Pennsylvania* while in tow of the tug *Grace Moran*. The *Pennsylvania*, owned by petitioner (American), was engaged in dredging operations off Rockaway Beach, Long Island on July 31, 1978 pursuant to a U.S. Army Corps of Engineers beach restoration contract. The dredge superintendent decided to move the dredge into the protected waters of East Rockaway Inlet because the weather was unfavorable for further dredging operations. The dredge had no propulsive power and no way to control its own navigation; it had to rely on tugboats to be moved from one place to another. The dredge superintendent radioed the respondents (Moran) for a tug. The tug *Grace Moran* was assigned by Moran to tow the dredge. The *Grace Moran* arrived around noontime and made fast her towline; thereafter, the dredge was under the complete control of the tug.

During the towing operation along the Long Island coast, the tug's radar failed and the tug thereafter grounded on a charted shoal off Rockaway Point. The dredge, continuing in its momentum, was grounded on the same shoal, puncturing its bottom plating and flooding its engine and fire rooms. The tug

worked free of the shoal, and while the dredge was still sinking, the tug retowed the dredge into deeper water where she sank becoming a total loss. Crew members from the dredge were forced into the sea where they were rescued by U.S. Coast Guard sea and air rescue teams and a nearby tug. Several crew members sustained personal injuries and fuel oil aboard the dredge surfaced causing pollution of navigable waterways of the United States.

The Proceedings in the Courts Below

Moran filed a complaint seeking shipowner's exoneration from or limitation of liability pursuant to 46 U.S.C. §183. American filed a claim in the limitation proceeding for loss of the dredge, wreck removal and clean-up expenses, as well as a contingent claim for damages sustained by dredge crew members for personal injuries and governmental bodies for pollution clean-up expenses. American based its claims on Moran's negligence and Moran's contractual breach of warranty of workmanlike service. Dredge crew members who had sustained personal injuries also filed claims in the limitation proceeding, and the United States, which had assisted in the clean-up operations, filed as claimant under the Federal Water Pollution Control Act (FWPCA), 33 U.S.C. §1321(g) and (h).

Following ten days of trial, the district court denied Moran's petition for exoneration or limitation of liability, basing its denial on the tug's unseaworthiness for failing to have an adequate radar, and Moran's negligence for (a) improper navigation, (b) failing to ascertain the dredge's condition before resuming the tow, (c) failing to post a lookout, and (d) improper supervision by Moran's managerial personnel. The court found the dredge unseaworthy because of opened doors and lack of compartmentalization. The dredge superintendent was found at fault for failing to warn the tug of the shoal and the fact that the dredge was taking on water. The court then allocated responsibility for the casualty, finding Moran 65% at fault and Ameri-

can 35% at fault. The court made no explicit finding concerning Moran's contractual breach of warranty of workmanlike service.

Moran filed an appeal based on the court's denial of limitation of liability. American cross-appealed on the issue of full recovery for loss of the dredge and indemnity for third party claims based on Moran's contractual breach of warranty of workmanlike service. The United States cross-appealed for relief under subsection (h) 33 U.S.C. §1321 of the Federal Water Pollution Control Act.

The court of appeals affirmed the judgment of the district court but granted the United States a remand on its cross-appeal for relief under subsection (h) §1321 of FWPCA. American then petitioned for rehearing. The court of appeals modified its previous order and granted American a remand on its claim for Moran's breach of warranty. On remand, the district court granted the United States the relief it requested under subsection (h) of 33 U.S.C. §1321. It refused, however, to grant American relief for full recovery and indemnity on the breach of warranty claim, despite the fact that American had pleaded the warranty claim, included the warranty claim in the pre-trial order, briefed it for the trial court and thereafter had proved the warranty claim by proof of Moran's negligence. American, once again, appealed the decision of the district court. The court of appeals affirmed the decision, agreeing with the district court that American should not be allowed to escape from its share of fault through the warranty theory and that American had waived the warranty claim.

Reasons for Granting the Writ

I.

First, the decision below contravenes the intent and clear purpose of Rule 54(c) Fed. R. Civ. P., that a final judgment shall

grant a prevailing party the relief to which he is entitled even if he has not demanded such relief in his pleadings.

In the case at bar, American was not accorded the benefits of Rule 54(c), even though it included the claim for Moran's breach of warranty of workmanlike service in the pleadings, the pre-trial order,* the trial brief, and thereafter proved the claim at trial by the very same evidence which proved Moran's negligence. *See Crumady* v. *The J. H. Fisser*, 358 U.S. 423, 429 (1959).

The opinion of the court of appeals imposed a new requirement not found in the Federal Rules or in any prior decision, that in order to avoid a waiver, a party must "press in the trial court the nature of its claims and the legal theories supporting them". (3a**) This conflicts with the mandate of Rule 54(c), as illustrated by the leading case applying that rule, i.e., *Massachusetts Bonding & Ins. Co.* v. *State of N.Y.*, 259 F.2d 33 (2d Cir. 1958), where the court held:

> "Of course it is always desirable to urge to the district court the legal theories upon which a party claims decision. But as Rule 54(c), F.R.Civ.Proc., points out, *it is the court's responsibility to award relief required by the facts on any proper ground, regardless of the theories urged by the parties.*"
> (*Id.* at 40) (emphasis added)

Wright, *Law of Federal Courts*, §98 at 658 (4th ed. 1982) in discussing Rule 54(c), states:

"Particular legal theories of counsel then are subordinated

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*The pre-trial order which was entered by the trial court pursuant to Rule 16 Fed. R. Civ. P. represented a complete statement of all the contentions of the parties. *Trujillo* v. *Uniroyal Corp.*, 608 F.2d 815, 817 (10th Cir. 1979). *See Howard* v. *Kerr Glass Mfg. Co.*, 699 F.2d 330, 333 (6th Cir. 1983).

**a—refers to appendix.

to the court's right and duty to grant the relief to which the prevailing party is entitled whether demanded or not."

A plaintiff may recover damages for breach of contract even though the complaint alleges only a tort. *Thomas* v. *Pick Hotels Corp.*, 224 F.2d 663, 666 (10th Cir. 1955). American should have been granted relief since both tort and contractual breach of warranty claims were pleaded and proved. *See also, Williams* v. *Pennsylvania RR. Co.*, 313 F.2d 203, 214-15 (2d Cir. 1963); Wright, Miller & Kane, *Federal Practice & Procedure*, Civil, §2264, n.2 (2d ed. 1983).

Following American's petition for rehearing, on the first appeal, the court of appeals, satisfied that sufficient ambiguity existed as to whether American's claim for breach of warranty was preserved or abandoned *at trial*, remanded the case to determine if the claim was available to American, and if so, the merits of the claim. (21a) The trial judge expressly held on remand that he had treated the breach of warranty claim *during and after trial*, as an additional argument to defeat Moran's petition for exoneration or limitation. (12a) Since the trial judge did consider the claim at trial, it cannot be said that American failed to preserve or had abandoned the warranty claim.

On remand, the trial judge denied American the right to raise the warranty issue, basing his denial, in part, on the fact that, although he had invited the parties to correct his oral bench decision, American did not object to the court's failure to understand the broader purpose of American's pre-trial submissions (12a), i.e. that the breach of warranty claim would support American's claim for full recovery for loss of the dredge and indemnity for third party claims.* If American failed to ob-

*Even if American had brought the warranty claim to the trial judge's attention in response to his invitation, American still would have been denied the relief it requested because of the trial judge's erroneous interpretation and application of *United States* v. *Reliable Transfer* to this breach of warranty case, discussed *infra*.

ject, however, so did all the other parties. No party made any proposal to amend or change the decision—neither Moran, which had every reason to do so since it lost on both counts, i.e., exoneration and limitation, nor the Government which had erroneously urged subsection (g) of §1321 FWPCA at trial, rather than subsection (h).

The result is anomalous because the trial judge did not hold that the Government's claim should be denied even though it was not until the remand that he learned that subsection (h) of §1321 and not subsection (g) was the proper subsection that should have been urged by the United States. (14a) The result demonstrates that American was held to a higher standard than the Government.

The trial court was made fully aware of the purpose of the breach of warranty theory on remand, and with a proven record before it of Moran's negligence, affirmed on the prior appeal, it was still timely under Rule 54(c) to have granted American judgment for full recovery for the loss of the dredge and indemnity for third party claims.

The trial court's subsequent denial on remand affirmed by the court of appeals constituted an ex post facto disenfranchisement of a claim that had already been won by American on the proven record which simultaneously established Moran's negligence and breach of warranty of workmanlike service.

Allowing the decision to stand is an injustice to American. It will impose requirements in future cases that conflict with the purpose of Rule 54(c). Rule 54(c) guarantees that relief commensurate with the established record will be accorded to the prevailing party.

II.

Second, with respect to American's claim for full recovery for loss of the dredge, the decision of the lower court is at odds with

Fairmont Shipping Corp. v. *Chevron International Oil Company*, 371 F.Supp. 1191 (S.D.N.Y. 1974), *aff'd*, 511 F.2d 1252 (2d Cir.), *cert. denied*, 423 U.S. 838 (1975), the leading case permitting a suit *ex contractu* for damage to a tow caused by a tug's breach of warranty of workmanlike service. *Fairmont*, which is based on principles enunciated by this Court in *Ryan Stevedoring Co.* v. *Pan-Atlantic Steamship Corp.*, 350 U.S. 124 (1956), is followed in the Fourth and Ninth Circuits. *Fairmont*, in turn, is at odds with this Court's decision in *Stevens* v. *The White City*, 285 U.S. 195 (1932), which holds that a suit for damage brought against a tug by her tow is *ex delicto* not *ex contractu*. This rule is adhered to in the First, Fifth and Eighth Circuits.

In the *ex delicto* circuits, the tow must prove that the tug was negligent; whereas, in the *ex contractu* circuits, a tug can be held strictly liable for breach of warranty based on non-negligent conduct, *Fairmont*, 511 F.2d at 1260; *see Italia Societa per Azioni Navigazione* v. *Oregon Stevedoring Co., Inc.*, 376 U.S. 315, 324 (1964).

The district court's allocation of fault between the tug and the dredge, approved by the Second Circuit, would have been valid only in a tort action brought in an *ex delicto* circuit where damages must be allocated in proportion to fault under *United States* v. *Reliable Transfer Co., Inc.*, 421 U.S. 397 (1975). The district court's allocation of fault in this case, however, was improper, because American's claim for loss of the dredge was also based on Moran's contractual breach of warranty of workmanlike service which is recognized by the Second Circuit, an *ex contractu* circuit, as a valid theory of recovery. *Fairmont, supra*.

Because the dredge was not towed safely to destination, Moran should have been held to strict liability, *Italia, supra*, and American should have been granted complete recovery and indemnity unless American's conduct constituted "active hindrance," *see Albanese* v. *N.V. Nederl. Amerik Stoomv. Maats,*

346 F.2d 481 (2d Cir.), *rev'd on other grounds*, 382 U.S. 283, (1965). The district court on remand, however, found that American's omissions did not constitute "active hindrance". (13a) Thus, there was no legal bar to complete recovery or indemnity.

With respect to American's claim of indemnity under *Ryan Stevedoring Co.* v. *Pan-Atlantic Steamship Corp., supra* for third party claims asserted by dredge crewmembers and the Government, the evidence adduced at trial proved that all the crucial elements for *Ryan* indemnity to attach were satisfied, i.e.,

1. "a shipowner,"

2. "relying on the expertise of another party [the contractor],"

3. "enters into a contract"

4. "whereby the contractor agrees to perform services without supervision or control by the shipowner;"

5. "the improper, unsafe or incompetent execution of such services would foreseeably render the vessel unseaworthy or *bring into play a pre-existing unseaworthy condition;*"

6. "and the shipowner would thereby be exposed to *liability regardless of fault.*" *Fairmont*, 511 F.2d at 1258. (emphasis added).

American was exposed to liability without fault to dredge crewmembers when Moran's improper, unsafe or incompetent execution of services brought into play the dredge's pre-existing unseaworthiness.* *See Navieros Oceanikos, S.A.* v. *S.T. Mobil Trader*, 554 F.2d 43, 46 (2d Cir. 1977).**

*American was also exposed to liability without fault to the Government because FWPCA imposes strict liability on the spilling vessel. *United States* v. *M/V Big Sam*, 681 F.2d 432, 437 (5th Cir. 1982), *cert. denied*, 103 S.Ct. 3112 (1983).

**For an analysis of *Fairmont* and *Navieros, supra*, see *Gaymon* v. *Prudential Lines, Inc.*, 473 F.Supp. 161 (S.D.N.Y. 1979).

Neither the dredge's pre-existing unseaworthy condition brought into play by Moran's incompetent execution of services nor the dredge superintendent's inaction in failing to warn were found by the district court to have constituted "active "hindrance". *See Albanese, supra.*

Ryan indemnity, based on the implied warranty of workmanlike service, therefore, should have been granted to American for dredge crewmembers' personal injury claims and for Government clean-up claims.

III.

Third, the district court was in error when it applied the *Reliable Transfer* concept of proportional fault to this action, in order to further justify its refusal to grant indemnity.* (13a) The court of appeals gave its stamp of approval to the district court's reasoning that current law is unlikely to sanction indemnity under breach of warranty. (14a) Both courts erred because the district court in arriving at that conclusion relied on *United States* v. *Reliable Transfer Co., Inc., supra,* which only applies to tort actions. *Reliable Transfer* has no application to cases involving marine service contracts. It was a pure tort action for stranding damage to a vessel, where this Court did away with the century old rule of divided damages in collision cases, *The Schooner Catharine* v. *Dickinson,* 58 U.S. [17 Wall.] 169 (1855), and allocated damages in proportion to fault.

The application of *Reliable Transfer* has been restricted to tort actions; it should not be extended to contractual breach of warranty cases.

In view of the growing importance of barge transportation and the continued need for tug assistance in harbors, cases sim-

*Although the district court failed to deal in its opinion with American's property damage claim for loss of the dredge, its reasons for denial of indemnity also would have served to deny this claim.

ilar to the case at bar will undoubtedly arise in the future where the tow will be held strictly liable for unseaworthiness caused or brought into play by the tug's improper execution of services, resulting in concomitant injury, loss of life or pollution of the nation's waterways.

The owner of the tow relinquishes total control of his vessel to the towing company which supplies the motive power, the implements of navigation and the expertise of personnel to perform the towing operation. Replacing the rule in *Stevens* v. *The White City* with the *ex contractu* rule would ensure vigilance by the tower and promote the interests of safety because liability would fall upon the towing company, the party best situated to adopt preventive measures and thereby reduce the likelihood of injury or damages. *Italia*, 376 U.S. at 324. Thus, the burden would be placed upon the towing company whose default causes the injury. *See Reed* v. *The Yaka*, 373 U.S. 410, 414 (1963).

> "When the cheapest way of avoiding a careless accident is for one party to take all the precautions, the law needs a mechanism for bringing liability to bear ultimately on that party, *and indemnity supplies it.* Admiralty law, like common law, is concerned with safety and efficiency. The tendency to use tort liability to spread rather than to prevent losses may be stronger in admiralty than in the common law, but it is not so overpowering as to have prevented the courts from devising imaginative theories of indemnity in a variety of often tenuously contractual maritime settings."

Hillier v. *Southern Towing Co.*, 714 F.2d 714, 721 (7th Cir. 1983) (emphasis added).

CONCLUSION

Certiorari should be granted.

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APPENDIX

Opinion of the Court of Appeals Dated November 21, 1983

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 21st day of November, one thousand nine hundred and eighty-three.

Present:

HONORABLE WILFRED FEINBERG
Chief Judge

HONORABLE JON O. NEWMAN
HONORABLE GEORGE C. PRATT
Circuit Judges

N.B. Since this statement does not constitute a formal opinion of this court and is not uniformly available to all parties, it shall not be reported, cited or otherwise used in unrelated cases before this or any other court.

In the Matter of the Complaint
of
BERKLEY CURTIS BAY CO., and of MORAN TOWING & TRANSPORTATION CO., INC., as Owner and Bareboat Charterer, respectively, of TUG GRACE MORAN for Exoneration from or Limitation of Liability.

AMERICAN DREDGING COMPANY,
Claimant-Appellant, 83-6076

BERKLEY CURTIS BAY CO., and MORAN TOWING & TRANSPORTATION CO., INC.,
Plaintiffs-Appellees,

UNITED STATES OF AMERICA, STANISLAW JEDRZEJEWSKI, CLIFFORD JACKSON and EDWARD COHEN,
Claimants-Appellees.

Opinion of the Court of Appeals dated November 21, 1983

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged and decreed that the judgment of said District Court be and it hereby is AFFIRMED.

1. This case was tried as to liability in late 1981 before Judge Abraham D. Sofaer, who ruled from the bench that liability for the loss of the dredge *Pennsylvania* and for third-party claims arising therefrom was to be apportioned according to fault, of which he assigned 65% to appellees Berkley Curtis Bay Co. and Moran Towing & Transportation Co., Inc. (collectively "Moran"), and 35% to appellant American Dredging Company ("ADC"). On appeal, this court ruled by order of June 28, 1982, inter alia, that ADC could not raise the breach of warranty of workmanlike performance theory on appeal because it had not presented the theory at trial or in its post-trial argument, although the theory had been presented in the pleadings and the pretrial order, and because it had not raised the theory in response to the judge's invitation for further argument or corrections at the outset of his oral opinion assigning proportionate liability. After consideration of ADC's petition for rehearing, the panel, by order of September 3, 1982, modified its earlier order to remand the warranty issue to the district court for a determination of whether this contention is available to ADC, and if so, the merits of this contention. On remand, the district court held, in an opinion dated February 3, 1983, that ADC had not properly preserved the warranty theory at trial and that a miscarriage of justice would not occur by denying ADC the right to raise the issue at that time. Indeed, Judge Sofaer

stated that allowing ADC to escape its share of the fault through the warranty theory would "lead to a particularly unjust result."

2. We reject appellant's contention that Judge Sofaer erred in ruling that the warranty theory was not preserved. It is the litigant's duty to press in the trial court the nature of its claims and the legal theories supporting them. We find the court's ruling that ADC waived its warranty claim adequately supported by the record, and we find no substantial injustice in holding ADC to that waiver.

3. We have considered all of appellant's arguments on the waiver issue and find them to be without merit, and accordingly we do not find it necessary to reach ADC's other arguments in this appeal.

4. We affirm the judgment of the district court.

WILFRED FEINBERG, Chief Judge

JON O. NEWMAN,
GEORGE C. PRATT,
Circuit Judges,

Amended Interlocutory Order and Judgment of the District Court Dated February 25, 1983

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In the Matter of The Complaint of Berkley Curtis Bay Co. and Moran Towing & Transportation Co., Inc., as Owner and Bareboat Charterer, Respectively of Tug Grace Moran, for Exoneration from or Limitation of Liability.	AMENDED INTERLOCUTORY ORDER AND JUDGMENT 78 Civ. 3552 (ADS)

WHEREAS, the issues as to liability for the losses and damages arising from the sinking of Dredge PENNSYLVANIA off Rockaway Point on July 31, 1978 and the right of any party held liable to limit its liability having been tried before the Honorable Abraham D. Sofaer, United States District Judge for Southern District of New York, on October 26, 27, 28, 29, 30, November 2, 3, 4, 5, 6 and 10, 1981, with proof adduced by the parties, and having been argued and submitted by the attorneys for the parties, and due deliberation having been had thereon and the Court having rendered its oral findings of fact and conclusions of law, finding that the grounding, subsequent sinking, and total loss of Dredge PENNSYLVANIA, the resultant oil spillage into the navigable waters of the United States and claims for personnal injuries alleged in the pleadings, were due sixty-five percent (65%) to the fault of plaintiffs Berkley Curtis Bay Co. and Moran Towing & Transportation Co., Inc., and thirty-five percent (35%) to the fault of claimant American Dredging Company, that plaintiffs Berkley Curtis Bay Co. and Moran Towing & Transportation Co., Inc. were not entitled to exoneration nor to limitation of liability under 46 U.S.C. §§183

et seq., and that plaintiffs and claimant American Dredging Company were entitled to limit their liability for oil spillage removal expenses to the United States of America under 33 U.S.C. §1321, and

WHEREAS the Court entered an Interlocutory Order and Judgment filed on February 1, 1982, and

WHEREAS plaintiffs Berkley Curtis Bay Co. and Moran Towing & Transportation Co., Inc. took an Appeal from that part of the above Interlocutory Order and Judgment which denied their petition for limitation of liability, and

WHEREAS American Dredging Company cross-appealed the allocation of fault between American Dredging Company and Moran and the denial of full recovery and indemnity to American Dredging Company under the theory of breach of warranty of workmanlike service, and United States of America cross-appealed on the issue of Moran's right to limit liability to the United States of America for the pollution clean-up expenses to the gross tonnage of the tug, and

WHEREAS, the Second Circuit Court of Appeals issued its first unpublished opinion on June 28, 1982 affirming in part and remanding in part the aforesaid judgment to the United States District Court, specifically affirming all issues except those relating to Moran's liability under the FWPCA (33 U.S.C. §1321) which was remanded for further consideration, and

WHEREAS, American Dredging Company petitioned the Second Circuit Court of Appeals for a rehearsing with suggestion for rehearing in banc with respect to the issue of American Dredging Company's right to obtain full indemnity from Moran on the theory of breach of warranty of workmanlike service; and

WHEREAS, the Second Circuit Court of Appeals on September 3, 1982, on consideration of the petition for rehearing with

suggestion for rehearing in banc of American Dredging Company amended its Order and Opinion of June 28, 1982 by adding to the remand to the District Court American Dredging Company's contentions concerning an alleged breach of warranty of workmanlike service by Moran with respect to American Dredging Company's in addition to the issues relating to Moran's liability under FWPCA to the United States of America, and

WHEREAS upon remand the remanded issues were submitted to this Court's consideration upon motions and written briefs and this Court denied American Dredging Company's claim for full recovery and indemnity and held that plaintiffs Berkley Curtis Bay Co. and Moran Towing & Transportation Co., Inc. and Tug Grace Moran were jointly and severally liable without limitation to claimant United States of America for pollution clean-up expenses arising from the incidents underlying this lawsuit, and

WHEREAS, this is an action involving admiralty and maritime claims within the meaning of Rule 9(h) of the Federal Rules of Civil Procedure and the Supplemental Rules for Certain Admiralty and Maritime Claims in which interlocutory appeals are allowed under 28 U.S.C. §1292(a)(3), see *Ira S. Bushey & Sons, Inc.* v. *United States*, 398 F.2d 167, 169 (2 Cir. 1968), Benedict on Admiralty Vol. 3, §93.

Now on cross-motions for entry of judgment, it is

ORDERED, ADJUDGED AND DECREED that the Interlocutory Order and Judgment previously filed herein on February 1, 1982 is now hereby vacated and substituted by this Amended Interlocutory Order and Judgment; and it is further

ORDERED, ADJUDGED AND DECREED that the transcript of the Court's opinion delivered on November 10, 1981 as corrected pursuant to Order dated January 29, 1982, together

with this Court's Memorandum Decision and Order filed on February 11, 1983 be and hereby are adopted as the Court's findings of fact and conclusions of law pursuant to Rule 52 of the Federal Rules of Civil Procedure; and it is further

ORDERED, ADJUDGED AND DECREED that the responsibility for the grounding, subsequent sinking, and total loss of Dredge PENNSYLVANIA, the resultant oil spillage into the navigable waters of the United States and claims for personal injuries alleged in the pleadings is hereby apportioned sixty-five per cent (65%) against plaintiffs Berkley Curtis Bay Co. and Moran Towing & Transportation Co., Inc. and thirty-five per cent (35%) against claimant American Dredging Company; and it is further

ORDERED, ADJUDGED AND DECREED that the liability of Berkley Curtis Bay Co. and Moran Towing & Transportation Co., Inc. is without limitation and their request for exoneration from or limitation of liability is hereby denied; and it is further

ORDERED, ADJUDGED AND DECREED that plaintiffs Berkley Curtis Bay Co. and Moran Towing & Transportation Co., Inc., Tug Grace Moran and claimant American Dredging Company are jointly and severally liable to claimant United States of America for any and all sums of its provable oil spillage removal and containment expenses, said liability of claimant American Dredging Company being limited to no more than $300,000.00; and it is further

ORDERED, ADJUDGED AND DECREED that plaintiffs, Berkley Curtis Bay Co. and Moran Towing & Transportation Co., Inc., and claimant, American Dredging Company, are jointly and severally liable for the full amount of the provable damages of claimants, Stanislaw Jedrzejewski and Clifford Jackson; and it is further

Amended Interlocutory Order and Judgment of the District Court dated February 25, 1983

ORDERED, ADJUDGED AND DECREED that plaintiffs, Berkley Curtis Bay Co. and Moran Towing & Transportation Co., Inc. and claimant, American Dredging Company, are jointly and severally liable for ninety per cent (90%) of the provable damages of claimant, Edward Cohen; and it is further

ORDERED, ADJUDGED AND DECREED that plaintiffs, Berkely Curtis Bay Co. and Moran Towing & Transportation Co., Inc. and claimant, American Dredging Company, are jointly and severally liable for costs herein of claimants, United States of America, Stanislaw Jedrzejewski, Clifford Jackson and Edward Cohen, except that claimant United States of America shall not be entitled to any costs incidental to its Cross-Appeal from the Interlocutory Order and Judgment filed herein on February 1, 1982 and/or the remand thereof; and it is further

ORDERED, ADJUDGED AND DECREED that claimant American Dredging Company recover sixty-five percent (65%) of its provable damages and costs, including but not limited to claims of third parties, from Berkley Curtis Bay Co. and Moran Towing and Transportation Co., Inc., except that claimant American Dredging Company shall not be entitled to any costs incidental to its Cross-Appeal from the Interlocutory Order and Judgment filed herein on February 1, 1982 and/or the remand thereof; and it is further

ORDERED, ADJUDGED AND DECREED that plaintiffs, Berkley Curtis Bay Co. and Moran Towing and Transportation Co., Inc. recover thirty-five percent (35%) of their provable damages and costs, including but not limited to claims of third parties, from claimant, American Dredging Company except that plaintiffs shall not be entitled to any costs incidental to the two Cross-Appeals from to Interlocutory Order and Judgment filed herein on February 1, 1982 and/or the remand thereof; and it is further

Amended Interlocutory Order and Judgment of the District Court dated February 25, 1983

ORDERED, that if the damages cannot be agreed upon between and among the parties, then damages and interest thereon recoverable by all parties shall he tried separately before this Court pursuant to Rule 42(b) of the Federal Rules of Civil Procedure; and it is further

ORDERED, that this Court's restraining Order enjoining all suits, actions or proceedings against plaintiff entered on August 7, 1978 is hereby vacated and withdrawn except as to those claimants presently before the Court.

So ordered.

Dated: New York, New York
February 25, 1983

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U.S.D.J.

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Clerk

Memorandum Opinion and Order of the District Court Dated February 11, 1983

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In the Matter
of
The Complaint of Berkley Curtis Bay Co. and Moran Towing & Transportation Co., Inc., as Owner and Bareboat Charterer, Respectively of Tug GRACE MORAN, for Exoneration from or Limitation of Liability.

MEMORANDUM OPINION AND ORDER
78 Civ. 3552 (ADS)

APPEARANCES:

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—Attorneys for American Dredging Co.—

J. PAUL McGRATH, Ass't Attorney General
JOHN S. MARTIN, Jr., U.S. Attorney

Memorandum Opinion and Order of the District Court dated February 11, 1983

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U.S. Dep't of Justice
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ABRAHAM D. SOFAER, D.J.:

On July 31, 1978 the tug *Grace Moran* and its tow the dredge *Pennsylvania* ran aground on a shoal off Rockaway Point known as Louie's Hump. The *Pennsylvania* subsequently sank and became a total loss. Members of its crew allegedly suffered personal injuries, and the United States spent $235,000 to clean-up oil which spilled from the dredge's fuel tanks. Following ten days of trial and one day of argument, this Court denied a petition to exonerate or limit the liability of Berkley Curtis Bay Co. and Moran Towing & Transportation Co., respectively the owner and the bareboat charterer of the *Grace Moran* (hereinafter collectively referred to as "Moran"). The Court further found Moran 65% at fault and American Dredging Company (hereinafter "ADC"), the owner of the dredge *Pennsylvania*, 35% at fault for all damages resulting from the accident, including the expenses incurred by the United States in cleaning up the oil spill.

Following appeals by the various parties, the case has been remanded by the Second Circuit for two purposes: first, to determine whether ADC may claim that Moran's breach of a warranty of workmanlike service ("WOWS") precludes ADC liability and, if so, whether that claim has merit; second, to clarify whether and to what extent Moran may be held liable for the government's oil-spill cleanup expenses under § 1321 of the Federal Water Pollution Control Act ("FWPCA"), 33 U.S.C. § 1321.

Memorandum Opinion and Order of the District Court dated February 11, 1983

ADC's claim concerning Moran's breach of WOWS was not preserved in the form that it was asserted on appeal. ADC did not claim at trial that Moran's breach entitled it to recover irrespective of its own negligence. This Court—and all the parties including ADC—treated the breach of WOWS claim during and after the trial as an additional argument against Moran's petition to avoid or limit its liability. The Court found Moran liable without limitation on other grounds and, accordingly, did not mention the WOWS claim in its oral opinion. Although the Court invited corrections to its opinion, ADC did not object to the Court's failure to divine ADC's allegedly broader purpose from its pretrial submissions. *See Desert Palace, Inc.* v. *Salisbury*, 401 F.2d 320, 323-24 (7th Cir. 1968).

Appeals based on "claims and defenses that were pleaded but not properly pursued in the trial court" should not be allowed "except in the most extraordinary circumstances to prevent a miscarriage of justice." *Broadway Delivery Corp.* v. *United Parcel Service*, 651 F.2d 122, 126 (2d Cir. 1981). There is no miscarriage of justice in not allowing ADC to attempt to avoid liability for its share of fault for the damages in this case.

ADC's assertion that Moran's breach of WOWS precludes ADC liability is tenuous under existing law. In *Fairmont Shipping Corp.* v. *Chevron International Oil Co., Inc.*, 511 F.2d 1252, 1260 (2d Cir. 1975) the Second Circuit suggested that a tow could not be held liable for contributory negligence (short of "active hindrance") once it was established that damages had been caused in part by a tug's breach of WOWS. In *Navieros Oceanikos, S.A.* v. *S.T. Mobile Trader*, 554 F.2d 43, 46-47 (2d Cir. 1977), however, the Circuit Court held that a breach of WOWS does not generally preclude consideration of a plaintiff's contributory negligence. *Navieros* did suggest in dicta that, where personal injury damages exposed a plaintiff to liability

without fault under the unseaworthiness doctrine, WOWS doctrine might require indemnification regardless of the plaintiff's own fault. 554 F.2d at 46-47; *see Gaymon* v. *Prudential Lines, Inc.*, 473 F. Supp. 161, 164-65 (S.D.N.Y. 1979). ADC's reliance on this suggestion in *Navieros* is questionable, however, given recent developments in maritime law. The fact that ADC might be strictly liable to injured seamen hardly justifies a rule that would allow it to avoid completely its own fault. The Supreme Court's decision in *United States* v. *Reliable Transfer Co.*, 421 U.S. 397 (1975) plainly condemns such a rule by its emphatic declaration that damages in admiralty should be allocated in accordance with fault. 421 U.S. at 410-11; *see Hanover Insurance Co.* v. *Puerto Rico Lightrage Co.*, 553 F.2d 728, 730 & n. 3 (1st Cir. 1977); Note, *Towage Accidents and the Implied Warranty of Workmanlike Service: A New Strict Liability?*, 10 Ga. L.Rev. 794, 815 (1976).

The nature of ADC's faults, moreover, makes ADC's possible avoidance of its share of liability particularly unjust. Under the WOWS indemnity theory urged by ADC, ADC could be held liable only if its faults constituted "active hindrance." The seriously negligent omissions of ADC do not appear to constitute "active hindrance" as that concept has been interpreted. *See Rodriguez* v. *Olaf Pedersen's Rederi A/S*, 527 F.2d 1282 (2d Cir. 1975), *cert. denied*, 425 U.S. 951 (1976); *Albanese* v. *N.V. Nederlande Amerik Stoomv. Maats*, 346 F.2d 481 (2d Cir.), *rev'd on other grounds*, 382 U.S. 283 (1965). But ADC's omissions may have had even more serious consequences than many forms of "active hindrance"; its omissions (*i.e.* the crew's failure to warn of the shoal and of the need to prevent resumption of tow as well as the dredge's open doors and lack of compartments) made what would have been a serious accident into an unsalvageable disaster. Moreover, the dredge was unseaworthy because of its lack of a valid certificate for oceangoing opera-

tions under 46 CFR § 90.05-25. This omission constituted a statutory violation, and the Second Circuit has emphasized that limitations on liability resulting from such violations are strongly disfavored. *Tug Ocean Prince, Inc.* v. *United States*, 584 F.2d 1151, 1160 (2d Cir. 1978), *cert. denied*, 440 U.S. 959 (1979).

In sum, ADC did not properly preserve the issue of WOWS indemnification at trial, and a miscarriage of justice will not occur by denying ADC the right to raise this issue at this time. Current law is unlikely to sanction WOWS indemnification, and, in any event, such indemnification would lead to a particularly unjust result given ADC's various omissions, including its failure to obtain a valid certificate for oceangoing operations.

II.

At trial the Court held Moran liable to the government for its share of the United States' oil-spill cleanup expenses under § 1321(g) of the FWPCA. Subsection (g), which the government urged at trial as the appropriate provision, applies only to sole-cause, third (*i.e.* nondischarging) parties. Moran was held only 65% at fault for the oil spillage in this case and cannot, therefore, be held liable under subsection (g). The only provision under which Moran may be held liable is § 1321(h)(2), which preserves for the government nonstatutory remedies against third parties involved in oil spills. Among the remedies preserved by subsection (h)(2) is the government's right to hold a vessel and its owner jointly and severally liable for negligent oil pollution. *United States* v. *M/V Big Sam*, 681 F.2d 432, 443, *reh'g denied*, 693 F.2d 451 (5th Cir. 1982) (authorities collected).

The threshold issue with regard to Moran's liability to the United States under § 1321(h)(2) concerns Moran's claim that

the question of its liability under FWPCA is "moot". Moran asserts that § 1321 contains a hierarchy of remedies for government recovery of the costs of an oil-spill cleanup. According to Moran's argument, the preferred remedies in this hierarchy are found in § 1321(f) and § 1321(g), which respectively provide for discharger and sole-cause third party strict liability; so long as either of these remedies will afford the United States complete reimbursement, the remedies preserved by subsection (h)(2) should not be employed. Thus, Moran claims, because the government's claim for $235,000 is less than ADC's $300,000 limitation fund under § 1321(f), the issue of Moran liability under subsection (h)(2) is "moot".

This claim is negated by the plain language of subsection (h)(2): "The liabilities established by this section *shall in no way* affect any right . . . the United States Government may have against any third party whose actions may in any way have caused or contributed to the discharge of oil or hazardous substance." 33 U.S.C. § 1321(h)(2) (emphasis added). Moran's reliance on *United States* v. *Bear Marine Services*, 509 F. Supp. 710, 716-18 (E.D.La. 1980) is not persuasive. In *Bear Marine*, the District Court carefully described the purposes and provisions of § 1321 in denying a third party's motion to dismiss the government's claim for oil-spill cleanup costs brought under maritime tort doctrines preserved by subsection (h)(2). Although silent as to whether the discharger's limitation fund was less than the government's reimbursement claim, the opinion plausibly asserts that subsection (h)(2)'s preservation of nonstatutory remedies was designed to assure the government an alternative source of reimbursement in the event either of the limited liability remedies provided by subsections (f) or (g) proved inadequate. Language in the opinion further suggests that, in light of this statutory design, only those costs not covered by sources available under subsections (f) or (g) may be re-

covered under the remedies preserved by subsection (h)(2). *Bear Marine*, 509 F.Supp. at 718-19. Such a limitation on the availability of remedies preserved by subsection (h)(2) should not, however, be read into § 1321. Although Congress may have preserved nonstatutory remedies in order to assure full government reimbursement in the event the statutory remedies proved inadequate, Congress did not tailor its preservation of nonstatutory remedies to that purpose. As noted, Congress specifically stated that the statutory remedies "in no way affect" existing nonstatutory remedies against third parties.

Moreover, there is no compelling reason why the nonstatutory remedies preserved by § 1321(h)(2) should be unavailable to the government whenever the statutory remedies provided by subsections (f) or (g) are adequate. The United States may prefer to move under subsections (f) or (g) in many cases, inasmuch as those strict-liability provisions do not require proof of negligence; if, however, as in this case, a determination of negligence has already been made as to a third party, there is no reason not to allow the government to proceed separately against the negligent third party for its share of liability under maritime tort doctrines preserved by subsection (h)(2). Indeed, in this case it seems especially appropriate to allow the government to hold Moran, which was 65% responsible for the oil-spill in question, jointly and severally liable with ADC, which was only 35% responsible for the oil-spill. (Of course, if the government elects to demand reimbursement from either ADC or Moran for more than its share of fault, the party that pays for more than its share of fault will have an action for contribution from the party that pays for less than its share of fault.)

The second issue concerning Moran's liability to the United States under subsection (h)(2) is whether that liability is limited by the tonnage formula expressly provided in subsection

(g) for strictly liable, sole-cause third parties. This issue has been recently and very thoroughly explored by the Fifth Circuit in *United States* v. *M/V Big Sam, supra,* which concluded that a third party's liability for negligence under principles of maritime tort preserved by subsection (h)(2) should not be affected by the limitation provision of subsection (g). Without needlessly repeating the detailed analysis contained in *Big Sam,* the plain language of subsection (h)(2) does not call for a judicial transplant of the limitation on strict liability in subsection (g) to the negligence liability of third parties unrestrictedly preserved by subsection (h)(2). *See Big Sam,* 693 F.2d at 454-56 (discussing recent Supreme Court authority on the need to avoid unnecessarily creative judicial interpretations of unambiguous statutory language). Limiting the liability of all dischargers (subsection (f)), as well as strictly liable, sole-cause third parties (subsection (g)), while not limiting the liability of negligently liable third parties is not so illogical or irrational as to require judicial reconstruction of §1321. *See Big Sam,* 693 F.2d at 453 n. 5 & 454 n. 8.

Moran incorrectly suggests that under this reading of the statute it will be held liable without limitation only because it was not the sole cause of the oil-spill and thus did not qualify for liability limitation under subsection (g). *See* Moran Memorandum of Law (Dec. 16, 1982) 18. If the statutory language required such a reading, the language might well be deemed sufficiently illogical and irrational to require judicial reinterpretation. It is difficult to imagine any reason why a negligent party 100% responsible for an oil-spill should be entitled to a liability limitation unavailable to a negligent party 65% at fault. The language of § 1321, however, does not require such a reading. A sole-cause, negligent third party may be held liable without limitation under subsection (h)(2) to the same extent that a contributing-cause, negligent third party may be; indeed, the de-

fendant in *Big Sam* was just such a negligent, sole-cause third party liable under both subsection (g) and subsection (h)(2). *See* 681 F.2d at 442-43.

A final difficulty concerning Moran's liability under § 1321 (h)(2) is this Court's original finding that Moran is not a "third party" under § 1321(f). Transcript of Trial 1162. In its appellate brief Moran urged that this finding precluded holding it liable as a "third party" under § 1321(h)(2). Moran Appellate Reply Brief (May 21, 1982) 21. The Court of Appeals noted this apparent anomaly in its statement remanding this case. Moran's briefs on remand to this Court, however, do not mention the argument. This Court's finding concerning Moran's status under § 1321(f) was significant only insofar as ADC could have otherwise avoided its strict liability as discharger by invoking the exception in subsection (f) for oil spills caused solely by a "third party." The Court's finding concerning ADC's 35% responsibility for the oil spill, however, precluded ADC from avoiding liability under any of the exceptions in subsection (f). In short, the finding that ADC was 35% at fault made the the finding that Moran was not a "third party" under § 1321(f) irrelevant. Thus the propriety of inconsistently reading "third party" in different subsections of § 1321 is not at issue here because only the use of the term in subsection (h)(2) is involved.

Moran is undoubtedly a third party under subsection (h)(2). As detailed in opinions by the Fifth and First Circuit, a narrow reading of the sole-cause "third party" exception in § 1321(f) is justified by the statute's purpose of assuring government reimbursement for clean-up costs by holding discharging vessels strictly liable. *See United States* v. *LeBeouf Bros. Towing Co.*, 621 F.2d 787 (5th Cir.) *reh'g denied*, 629 F.2d 1350 (1980), *cert. denied*, 452 U.S. 906 (1981); *Burgess* v. *M/V Tamano*, 564 F.2d 964, 981-82 (1st Cir. 1977), *cert. denied*, 435 U.S.

941 (1978). This purpose is not served by narrowly construing the reference to "third party" in § 1321(h)(2); rather, a broad construction of the term in subsection (h)(2) serves the purpose of the statute in the same way a narrow reading of the term in subsection (f) does: by providing another source from which the government may attempt to procure reimbursement for clean-up expenses.

III.

In conclusion, ADC may not assert a WOWS claim as a means of avoiding liability for its share of fault, and Moran and the tug *Grace Moran* may be held jointly and severally liable to the government without limitation under § 1321(h)(2). No costs to any party. The parties are directed to submit a judgment within 10 days incorporating amendments to the Court's previous judgment that are indicated by this Order.

SO ORDERED.

Dated: New York, New York
February 11, 1983

ABRAHAM D. SOFAER
U.S. District Judge

Order on Petition for Rehearing Dated September 3, 1982

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 3rd day of September, one thousand nine hundred and eighty-two.

Present:

HONORABLE WILFRED FEINBERG
Chief Judge
HONORABLE RICHARD J. CARDAMONE
Circuit Judge
HONORABLE LEONARD B. SAND*
District Judge

In the Matter of the Complaint of BERKLEY CURTIS BAY CO., and of MORAN TOWING & TRANSPORTATION CO., INC., as Owner and Bareboat Charterer, respectively, of Tug GRACE MORAN for Exoneration from or Limitation of Liability — 82-6048/76/78

BERKLEY CURTIS BAY CO., and MORAN TOWING & TRANSPORTATION CO., INC.,
Plaintiffs-Appellants-Cross-Appellees,

—against—

UNITED STATES OF AMERICA, STANISLAW JEDRZEJEWSKI, CLIFFORD JACKSON, EDWARD COHEN, and AMERICAN DREDGING CO.
Defendants-Appellees,

UNITED STATES OF AMERICA and AMERICAN DREDGING CO.,
Defendants-Appellees-Cross-Appellants.

*Honorable Leonard B. Sand, of the United States District Court for the Southern District of New York, sitting by designation.

Order on Petition for Rehearing dated September 3, 1982

On consideration of the Petition for Rehearing on behalf of Claimant-Appellee/Cross-Appellant American Dredging Company with suggestion for Rehearing in Banc, it is now hereby ordered, adjudged and decreed that the Order and Opinion of this Court dated June 28, 1982 is modified as follows:

1) The first full paragraph on p. 2 is stricken and the following paragraph is substituted therefor:

> We affirm the decision below with respect to all issues except those relating to ADC's contentions concerning an alleged breach of warranty of workmanlike performance and those relating to Moran's liability under the FWPCA, which issues we remand for further consideration.

2) The third full paragraph on p. 2 is stricken and the following paragraph is substituted therefor:

> Second, ADC seeks to raise on appeal its contention that Moran has breached the warranty of workmanlike performance. Moran urges that ADC is precluded from raising this issue because it did not present that theory at trial or in its post-trial argument, even though this theory was presented in the pleadings and in the pre-trial order. Upon review of the record, we are satisfied that sufficient ambiguity exists as to whether this claim was preserved or abandoned at trial so that this issue should be remanded to enable the district court to render a clear-cut determination whether this contention is available to ADC and, if so, the merits of this contention, a conclusion we reach after having determined that, in any event, a remand is required herein.

Order on Petition for Rehearing dated September 3, 1982

The petition for Rehearing is granted to the extent reflected in this Order, and is in all other respects, denied.

WILFRED FEINBERG,
Chief Judge

RICHARD J. CARDAMONE
Circuit Judge

LEONARD B. SAND,
District Judge

Order and Opinion of Court of Appeals Dated June 28, 1982

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York on the 28th day of June, one thousand nine hundred and eighty-two.

Present:

HONORABLE WILFRED FEINBERG
Chief Judge

HONORABLE RICHARD J. CARDAMONE
Circuit Judge

HONORABLE LEONARD B. SAND*
District Judge

N.B. Since this statement does not constitute a formal opinion of this court and is not uniformly available to all parties, it shall not be reported, cited or otherwise used in unrelated cases before this or any other court.

*Honorable Leonard B. Sand, of the United States District Court for the Southern District of New York, sitting by designating.

Order and Opinion of Court of Appeals dated June 28, 1982

In the Matter of the Complaint of BERKLEY CURTIS BAY CO., and of MORAN TOWING & TRANSPORTATION CO., INC., as Owner and Bareboat Charterer, respectively, of Tug GRACE MORAN for Exoneration from or Limitation of Liability

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BERKLEY CURTIS BAY CO., and MORAN TOWING & TRANSPORTATION CO., INC., 82-6048/76/78

Plaintiffs-Appellants-Cross-Appellees,

—against—

UNITED STATES OF AMERICA, STANISLAW JEDRZEJEWSKI, CLIFFORD JACKSON, EDWARD COHEN, and AMERICAN DREDGING CO.,

Defendants-Appellees,

UNITED STATES OF AMERICA and AMERICAN DREDGING CO.,

Defendants-Appellees-Cross-Appellants.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

Order and Opinion of Court of Appeals dated June 28, 1982

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged and decreed that the judgment of said District Court be and it hereby is AFFIRMED in part and REMANDED in part.

The parties appeal from a decision of Judge Abraham D. Sofaer which held Berkley Curtis Bay Co. and Moran Towing & Transportation Co. (hereinafter jointly referred to as "Moran"), the owner and bareboat charterer, respectively, of the tug Grace Moran, and American Dredging Co. ("ADC"), the owner of the dredge Pennsylvania, at fault in the sinking of the dredge off Rockaway Beach on July 31, 1978. The District Court found both owners negligent and both vessels unseaworthy, and assigned Moran 65% responsibility and ADC 35% responsibility. The court found that Moran could not limit its liability under 46 U.S.C. § 183, because it had not met its burden of showing lack of privity. The court also held both Moran and ADC accountable to the Government under the Federal Water Pollution Control Act ("FWPCA"), 33 U.S.C. § 1321, for costs incurred in cleaning up the oil spill that resulted from the wreck and permitted both Moran and ADC to limit their liability under the provisions of that Act.

We affirm the decision below with respect to all issues except those relating to Moran's liability under the FWPCA, which we remand for further consideration.

First, we reject Moran's claim that it is entitled to limit its liability under 46 U.S.C. § 183, because we find that the record clearly supports the District Court's finding of negligent shoreside supervision, unseaworthiness in the failure to replace worn out radar equipment, and privity with respect to these two grounds for liability. Since we uphold these grounds for denial

of limitation, we need not reach ADC's claim that the failure to post a lookout provided a third ground for this finding.

Second, we agree with Moran that ADC may not raise the theory of breach of workmanlike performance on appeal because it did not present that theory at trial or in its post-trial argument, even though this theory was presented in the pleadings and in the pretrial order. Moreover, the trial judge invited further argument or corrections at the outset of his oral opinion. ADC's contention that it is not liable under the FWPCA, based entirely on its theory of breach of workmanlike performance, must also fail.

The question of Moran's liability under the FWPCA presents a more difficult question. Moran argues that no provision of 33 U.S.C. § 1321 provides a basis for liability because it is neither the discharging vessel nor a third party. The Government contends that Moran should be held liable under subsection (h) of that provision, and that, under that subsection, no limitation of liability arises. The Government concedes, however, that at trial it argued that liability arose under subsection (g), which does afford limitation of liability in the absence of wilful conduct. It now recognizes that subsection (g) only refers to third parties who are the sole causes of a spill and that Moran cannot fall into this category. The District Court's opinion does not specify under which subsection Moran was found to be liable, and the finding that Moran was not a third party makes it unclear how the court could have found liability under either subsection (g) or (h), although the application of the limitation of liability may indicate that the court relied on (g). Additionally, the Government has indicated that this issue may now be moot as to the Government in this case.

Under the circumstances, the District Court should be given an opportunity to address in the first instance the issue of moot-

ness and the question of Moran's liability under the FWPCA. Accordingly, we remand this case to the District Court so that it may consider these issues in light of the Government's arguments before this court.

Affirmed in part and remanded in part.

WILFRED FEINBERG,
Chief Judge

RICHARD J. CARDAMONE,
Circuit Judge

LEONARD B. SAND,
District Judge

Interlocutory Order and Judgment of the District Court Dated January 27, 1982

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In the Matter of The Complaint of Berkley Curtis Bay Co. and Moran Towing & Transportation Co., Inc., as Owner and Bareboat Charterer, Respectively of Tug Grace Moran, for Exoneration from or Limitation of Liability.	78 Civ. 3552 (ADS) INTERLOCUTORY ORDER AND JUDGMENT #82/0108

WHEREAS, the issues as to liability for the losses and damages arising from the sinking of Dredge PENNSYLVANIA off Rockaway Point on July 31, 1978 and the right of any party held liable to limit its liability having been tried before the Honorable Abraham D. Sofaer, United States District Court Judge, on October 26, 27, 28, 29, 30, November 2, 3, 4, 5, 6 and 10, 1981, with proof adduced by the parties, and having been argued and submitted by the attorneys for the parties, and due deliberation having been had thereon and the Court having rendered its oral findings of fact and conclusions of law, finding that the grounding, subsequent sinking, and total loss of Dredge PENNSYLVANIA, the resultant oil spillage into the navigable waters of the United States and claims for personal injuries alleged in the pleadings, were due sixty-five per cent (65%) to the fault of plaintiffs Berkley Curtis Bay Co. and Moran Towing & Transportation Co. Inc., and thirty-five percent (35%) to the fault of claimant American Dredging Company that plaintiffs Berkley Curtis Bay Co. and Moran Towing & Transportation Co., Inc. were not entitled to exoneration nor to limitation of liability under 46 U.S.C. *§§ 183 et seq.*, and that plaintiffs and claimant American Dredging Company were entitled to limit

their liability for oil spillage removal expenses to the United States of America under 33 U.S.C. § 1321, and

WHEREAS, this is an action involving admiralty and maritime claims within the meaning of Rule 9(h) of the Federal Rules of Civil Procedure and the Supplemental Rules for Certain Admiralty and Maritime Claims in which interlocutory appeals are allowed under 28 U.S.C. §1292(a)(3), see *Ira S. Bushey & Sons, Inc.* v. *United States*, 398 F.2d 167, 169 (2 Cir. 1968), Benedict on Admiralty Vol. 3, §93.

Now on cross-motions for entry of judgment by counsel for the respective parties, it is

ORDERED, that the transcript of the Court's opinion delivered on November 10, 1981 as corrected pursuant to Order dated January 12, 1982, be and hereby is adopted as the Court's findings of facts and conclusions of law pursuant to Rule 52 of the Federal Rules of Civil Procedure; and it is further

ORDERED, ADJUDGED AND DECREED that the responsibility for the grounding, subsequent sinking, and total loss of Dredge PENNSYLVANIA, the resultant oil spillage into the navigable waters of the United States and claims for personal injuries alleged in the pleadings is hereby apportioned sixty-five per cent (65%) against plaintiffs Berkley Curtis Bay Co. and Moran Towing & Transportation Co., Inc. and thirty-five per cent (35%) against claimant American Dredging Company; and it is further

ORDERED, ADJUDGED AND DECREED that the liability of Berkley Curtis Bay Co. and Moran Towing & Transportation Co., Inc. is (except for liability to the United States of America for oil spillage removal expenses) without limitation and their request for exoneration from or limitation of liability is hereby denied; and it is further

Interlocutory Order and Judgment of the District Court dated January 27, 1982

ORDERED, ADJUDGED AND DECREED that claimant United States of America, recover from plaintiffs Berkley Curtis Bay Co. and Moran Towing & Transportation Co., Inc., the sum of $42,150.00 and from claimant, American Dredging Company, the remainder of its provable oil spillage removal expenses up to the sum of $300,000.00; and it is further

ORDERED, ADJUDGED AND DECREED that plaintiff Berkley Curtis Bay Co. and Moran Towing & Transportation Co., Inc. and claimant, American Dredging Company, are jointly and severally liable for the full amount of the provable damages of claimants, Stanislaw Jedrzejewski and Clifford Jackson; and it is further

ORDERED, ADJUDGED AND DECREED that plaintiffs, Berkley Curtis Bay Co. and Moran Towing & Transportation Co., Inc. and claimant, American Dredging Company, are jointly and severally liable for ninety per cent (90%) of the provable damages of claimant, Edward Cohen; and it is further

ORDERED, ADJUDGED AND DECREED that plaintiffs, Berkley Curtis Bay Co. and Moran Towing & Transportation Co., Inc. and claimant, American Dredging Company, are jointly and severally liable for costs herein of claimants, United States of America, Stanislaw Jedrzejewski, Clifford Jackson and Edward Cohen; and it is further

ORDERED, ADJUDGED AND DECREED that claimant American Dredging Company recover sixty-five per cent (65%) of its provable damages and costs, including but not limited to contingent claims of third parties, from Berkley Curtis Bay Co. and Moran Towing & Transportation Co., Inc.; and it is further

ORDERED, ADJUDGED AND DECREED that plaintiffs, Berkley Curtis Bay Co. and Moran Towing & Transportation Co., Inc. recover thirty-five (35%) of their provable damages

and costs, including but not limited to contingent claims of third parties, from claimant, American Dredging Company, and it is further

ORDERED, that if the damages cannot be agreed upon between and among the parties, then damages and interest thereon recoverable by all parties shall be tried separately before this Court pursuant to Rule 42(b) of the Federal Rules of Civil Procedure; and it is further

ORDERED, that this Court's restraining Order enjoining all suits, actions or proceedings against plaintiffs entered on August 7, 1978 is hereby vacated and withdrawn.

This case is being placed on the Suspense Docket of this Court, pending resolution of the certified appeal. So ordered.

Dated: New York, New York
January 27, 1982

ABRAHAM D. SOFAER

U. S. D. J.

Opinion of the District Court Dated November 10, 1981

FINDINGS OF FACT AND CONCLUSIONS OF LAW

THE COURT: At this time I am prepared to deliver my findings of fact and conclusions of law in this case.

It is my custom to let the parties know that while I do not invite interruptions and arguments, I do invite proposed corrections or arguments afterwards in written form, and I do reserve the right to edit and to supplement the findings and conclusions with arguments, citations, etc.

It is a device for letting the parties know where the Court stands, and enabling me to have a draft from which I can work if I see any need or importance in the case to warrant putting it into a final opinion form.

I would say about 50 percent of my dictated opinions become written opinions, but I try to avoid it if I do not see any need for them.

I thought an appropriate way to go about this would be to start with a summary of the facts as I find them to have occurred.

The tug Grace Moran answered a call from the American Dredging Company for assistance in towing the dredge Pennsylvania into Rockaway Inlet from about a mile off Rockaway Beach on July 31, 1978.

The tug was in working order at the time with an operating radar. It reached the dredge about noon and took it in tow stern first. The tug's draft was about 14 feet forward and 16½ feet aft. The dredge had a draft of about 10 feet fore and aft.

The dredge, I find, was equipped with plates on all its doors about 30 inches high. I tend to believe that at least some of its deck doors were closed. However, as I will later go into in greater detail, I do believe that the doors were either open or opened while the dredge was grounded on the shoal. Seas were about six feet and the winds were about 20 to 25 knots.

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The purpose of the tow was the need to tow the dredge into a safe harbor because severe weather jeopardized its safety.

The captain of the tug arranged the tow and then went off watch once it had gotten under way. Mate Stewart was in command. The captain told the mate to make for Rockaway Inlet staying as close to shore as possible.

During the tow the radar became inoperative. Probably, as the mate stated, around buoy N2. The tug passed the red buoy N2 off Rockaway to the right of the buoy, on the starboard of the buoy, by a considerable distance, and I accept Mr. Cohen's testimony in this respect.

The tug made an adjustment to port but it was an insufficient adjustment to avoid the shoal known as Louie's Hump. The tug ran aground in 14 to 16 feet of water near, as I find, an area where the water was even less deep. The dredge floated by the tug to its starboard.

A request was made by Cohen as to whether he should drop anchor, which was a responsible request. The tug gave the responsible response, and that is yes, and an anchor was dropped, but the line gave.

Another anchor was then dropped but the dredge ran aground on a higher part of the shoal in about 10 feet of water before the anchor took hold or also before the line to the tug itself took hold.

In the process of running aground, either upon running aground on the shallow area of the shoal or in being slapped down on the shoal while the dredge had run aground, the dredge hit a rock with sufficient force to puncture a hole in its bottom about 23 feet from the stern and about 3 feet in from the starboard turn of the bilge.

Water rushed into the hole at a rate sufficient to sink the dredge within about 30 minutes, which is a conservative estimate on the testimony in the case.

The Pennsylvania called for help, including pumps, while it was still in relatively shallow water. Its own pumps could not keep up with the flooding.

The tugboat got free, and although the Pennsylvania had begun to sink and had water crashing over its main deck and into its doors at the time the tow was resumed.

The Pennsylvania sank about five minutes later off Louie's Hump in about 30 feet of water. It was a total loss.

Also, an oil spill occurred of over 200 tons of black oil and some diesel oil which the government participated in cleaning up.

The causes of the sinking were four. First, the main cause of the sinking was the holing of the vessel. Water entered the vessel through a hole in its bottom when it was put aground by the tug.

I find this to be a fact based on the overwhelming evidence in the case. The testimony of Cohen, Reeves, Episcopo, Jedrzejewski, and other crew members that they saw the water coming up from below the plates at the bottom of the engine and fire rooms. I accept that testimony.

Second, the story of the personnel on the dredge makes the most sense to me. They would have, I believe, the personnel on the dredge, noticed if very substantial quantities of water were coming in through the doors and down into the rooms in which some of them were working.

Soundings were taken by one individual, Cannon, and they indicated 10 feet or so of water. There was a call for pumps.

I don't believe that the open doors themselves could have taken in enough water to sink this vessel in the time allowed, based on the testimony of the naval architects in this case.

The theoretical reason why it seemed unlikely to at least one

witness that the dredge had holed itself on the ledge is really explainable. The testimony was that it was unlikely that one hole would be made in the bottom if it ran aground on the shoal and slapped on the shoal. To begin with, this reasoning applies with even greater force to Moran's theory that the vessel was holed when it sank and struck a rocky bottom; the many rocks where the vessel sank would be more likely to cause multiple holes than the relatively few rocks in the generally sandy shoal.

The hole was to one side of the vessel, and as Hackman said, the dredge was pivoting, and was not totally firm aground. One can only guess about what happens in these situations, but I think the most likely thing is that the vessel did, in one of the slaps or at the time of the original grounding itself, when it was moving at its greatest momentum, strike a rock which made a clean hole in it.

Incidentally, in that connection the people on the dredge themselves, during the course of the radio communications, indicated at that time that they believed there was a hole in the bottom of the dredge before the sinking and said so in a couple of transmissions, which was also consistent with the debris found around the hole indicating a rushing in of water from a sudden impact rather than water flowing into an area that had already been filled with water due to open doors or anything of that sort.

The second cause of the sinking was to an extent the doors. I accept Hackman's testimony and the testimony of other personnel, the tug personnel, and indeed some of the people on the dredge conceded that at least one of the doors was in fact open and had to be closed, and the Coast Guard people actually told the dredge the doors were open on the main deck in the transmission that I most recently obtained from the government.

I think that a substantial amount of water did go into the vessel as a result of the doors being open, particularly at the stage when the vessel had begun to sink.

When there was about four feet of water in the hull of the vessel, the main deck of the vessel at that point was so low the waves on Louie's Hump, which as Hackman testified were always higher and more dangerous than the waves around Louie's Hump, were sufficiently high to put substantial amounts of water into the vessel at a time when it was already in trouble and speeded up the vessel's demise, so to speak.

The third cause of the sinking was a pulling of the vessel off the shoal. I do think the vessel would have sunk, and in the technical sense ended up on the soal even if it hadn't been pulled off, but the pulling of the vessel off the shoal, I believe, speeded up the sinking and also caused it to sink in much deeper water.

The fourth cause of the sinking was the lack of compartmentalization of the dredge itself. The dredge was effectively a zero compartment vessel designed for service that was not on the open sea, so it filled up without retaining any reserve buoyancy.

Had it possessed watertight compartments the casualty would have at least taken longer to occur and might have been avoidable.

The evidence does not permit definitive determination one way or the other in this connection, but it is clear that the lack of separate watertight compartments contributed to the sinking.

I turn now to the responsibility for the sinking, keeping in mind what these faults are as I have stated them.

First, with respect to the plaintiffs Moran and Berkley, who I treat as one party for purposes of this opinion, they were negligent for several reasons.

First, it was a clear case of improper navigation. The tug ran aground a charted shoal, and the law is clear that this creates in effect a presumption of negligence as the Bouchard Transportation case indicates, (389 F. Supp. 77).

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The fact that the vessel had no operating radar at the time should, if anything, have led to the exercise of greater than ordinary care, and ordinary care was in fact not exercised.

A second element of negligence was in the tug's failure to ascertain the precise condition of the dredge before resuming the tow. The tug personnel were aware that the dredge was taking on water and was in serious trouble.

The fact that Sanborn was unable to raise the dredge on his radio should not have caused him to be impatient but rather should have led him to infer that the radio might have been inoperative due to flooding under the circumstances here.

I do find that no sign was given by any person on the Pennsylvania to resume a tow.

The third element of negligence was a failure of Moran personnel properly to apprise and inform their tug after the casualty was reported. I will go into this in greater detail, but in general I say that the response to Mr. Santhin of the American Dredging Company's pleas for attention were inadequate.

Finally, under the special circumstances of this case, I think it was negligent on the part of the mate not to post a lookout because once his radar went out, accepting his testimony that he did know there was a shoal there, he should have had somebody spend all his time looking out carefully at Louie's Hump, which, incidentally, would have and should have given him considerable notice since the Hump was quite apparent, the waves there being substantially higher than in the area surrounding it.

I also find the responsibility for the sinking attributable to Moran for reasons of unseaworthiness. First, the radar on this vessel was inadequate. I accept Mr. McNally's testimony that a radar with so many problems should have been replaced after as many years as it had been on that vessel.

I found his testimony the most credible and convincing of the

witnesses involved, Daley being much less convincing and less experienced, and his own experience appeared to be irrelevant in that he works for the government in the capacity that he indicated.

The testimony of McNally was corroborated by the uncontroverted fact that the useful life of a radar system, such as the one we had on this vessel, averaged around eight years, perhaps as high as ten.

The Ambruster deposition shows how many things were wrong with this particular radar on July 8, 1978, and the exhibits in connection with the Sisko deposition show the extensive repair work that had been done on the radar. Indeed, the repair cost as testified to by Miller in his deposition, between February 27, 1978 to October 31, 1978, amounted to $3,043.75, which turns out to be about a third of the cost of replacing the radar entirely.

The lack of an adequate radar was particularly important in this situation since radar was the principal navigational tool other than eyes and compass. The vessel had no fathometer or other device.

In other situations radar might not be as essential as it was to this vessel. Here the lack of a fathometer or other equipment made it critical.

With respect to the fathometer, a lack of a fathometer may itself be a ground for unseaworthiness in some tugs, depending upon draft and type of service, in this Court's judgment.

In this case I find an insufficient basis in the record for a definitive ruling that the lack of a fathometer in itself constituted a ground for unseaworthiness. Indeed, even Captain Halboth did not so testify, as he would put it, but evidence of the need for a fathometer that I heard in this record was quite strong, and the practicability of fathometers was demonstrated by a couple of witnesses and not controverted by any other witnesses.

McVay said that new tugs being made and being ordered by Moran do have fathometers, and that 50 percent of all tugs have fathometers, and the other testimony was that fathometers are reliable and they are inexpensive.

Given the tremendous stakes involved in these tug situations, it would appear that tug operators should pay close attention to the likely possibility that some Court may, as an abstract principle in the future, hold that the absence of fathometers is in itself a ground for unseaworthiness or may hold so in some special circumstances that present themselves to the Court.

It seems to me in this case that the unseaworthiness can be stated in more general terms, and that is given the inadequate radar on board the vessel the vessel was inadequately equipped to handle the navigational problems it was likely to confront in the ocean-type towing activities that vessel was sent out to perform.

Had it had a fathometer and this particular radar I think a finding of unseaworthiness would have been more difficult to arrive at because a fathometer would have, as the testimony indicates, given the navigator an additional alternative device for checking his position vis-á-vis the bottom and thereby vis-á-vis other points, so I think the lack of a fathometer here contributed to unseaworthiness under the special circumstances.

I don't find that any showing was made that it was necessary for this vessel to have a pelorus system or other devices that were referred to.

I might say that my reluctance to reach any ruling that a fathometer is required by tugs in this kind of services is based, as was suggested by counsel, on the fact that the Coast Guard has regulations regarding radar and fathometers, etc., and it has specifically determined not to apply those regulations to tugs.

I think, under those circumstances, the Court should be much

more cautious in imposing a requirement than was proper in the *T. J. Hooper* case, where the government has taken no action concerning some device.

I will continue now to the responsibility of the American Dredging Company and the Pennsylvania personnel for the sinking. These personnel were negligent also for several reasons.

First, Cohen saw that the tug was on an unsafe course but took no action. He should have called the tug and asked the tug commander if he knew of the shoal. Having seen Mr. Cohen testify, it is difficult for me to conceive that a tug captain would readily have been able to intimidate him to the point where he would find himself incapable of calling on the radio and telling the tug captain to make sure the tug captain was on proper course.

But even given the most intimidating tug captains and the most genteel and hesitant of towed personnel, the fact is there was a responsibility on the part of all the people involved in a tow to be alert to the possibility that somebody who is handling some aspect of the navigation, and particularly the tug navigator, may not be aware or may not have taken proper precautions to avoid a hazard.

Second, it is possible, indeed likely, that some of the doors on the deck were open. However, what is more important—and that I find as a fact—is that while some of the doors were certainly closed and all of them may have been closed, the doors were in fact open when the dredge was aground on Louie's Hump. At that point the waves were higher than the sea around it and considerable water was taken in.

The Chitty case which was referred to this morning does make it clear this is negligence on the part of personnel, letting the doors remain open in this kind of situation. The doors were either open at the start of the tow, or were so unfit for ocean service that they were opened by moderately strong seas.

Finally, there was negligence in the failure to make sure the tug did not resume the tow. The dredge here does not have the responsibility equivalent to the responsibility of the towing captain, but I feel the dredge captain did have some responsibility, given the fact that he knew he was under tow and that there was still a line attached to him, to make sure that the tug did not have any intentions of resuming the tow and to make it clear to everyone involved that it would be better if the vessel sank in the more shallow water.

The failure to have doors that would withstand heavy seas, assuming the doors were closed originally, was an element of unseaworthiness for which I find the American Dredging Company responsible.

The dredge also was unseaworthy in that it lacked a valid certificate for oceangoing operations under 46 CFR, Section 90.05-25. A certificate of inspection was obtained on July 9, 1978, but only for an unmanned trip to New York from Camden. This was a limited venture and one in which the individuals involved could predict the weather with a reasonable degree of accuracy for the limited period involved.

The Coast Guard lieutenant who testified concerning this matter made it clear that different requirements would have been established for the dredge if it had submitted to an inspection for certificate to work off Rockaway Beach with personnel aboard.

Was the water off Rockaway Beach ocean? The Coast Guard's position is that the barge becomes oceangoing when it passes beyond the base line from internal waters to the sea. The regulations define seagoing as "on the high seas or ocean." High seas excludes the territorial seas.

Therefore, ocean has been interpreted to include the territorial sea, and I think in this respect the case that is controll-

ing here is *United States* against *Gahagan Dredging Corporation*, 289 F. 2d 639:

"A seagoing barge is any barge that goes to sea, including the territorial sea."

The Coast Guard's concern for safety of life and property adequately justifies the reasonableness of its position in this respect.

These causes of the sinking of the dredge Pennsylvania amounted to a responsibility in the following proportions: To Moran 50 percent responsibility for the grounding and the holing of the vessel due to the navigational negligence, which was gross and most inexcusable; 15 percent for pulling the vessel off the shoal for a total of 65 percent.

To the American Dredging Company, 10 percent for the failure to warn before and after the occurrence of the accident; 10 percent for the open doors and their contribution to the sinking of the dredge, and 15 percent for the lack of a certificate which would have made the vessel seaworthy in that respect, for a total of 35 percent.

Of course, I state these percentages of responsibility because I now go on to the next issue of limitation of liability.

I have looked at the relevant standards governing the responsibility and the allocation of responsibility. They are general, calling upon the judge to make an estimate of the seriousness of the particular aspect of the injury involved and its relationship to the injury, the extent to which it is at cause, and all the special circumstances of the case. I have done that to the best extent of my ability and come up with those figures, keeping in mind all aspects of the negligence and unseaworthiness that contributed to the loss.

On the question of limitation of liability, I am denying limitation of liability. It is the burden of the petitioner to establish

a lack of privity. The question is whether the owners have privity or knowledge of the unseaworthy conditions.

Privity has been found relatively easily by the courts, as indicated in the many scholarly and able pieces that I have before me, some of which are critical but nevertheless recognize the broad application that courts higher than this have given privity.

Employees in actual privity must be high enough to warrant imputing their knowledge to the owners. *Waterman Steamship* is a good guide with respect to this issue.

As I said, I found that the vessel was inadequately equipped. The service reports, etc., all found their way into the hands of the personnel at Moran, who were responsible for the maintenance of the tugs involved, and it was the responsibility of the owner to set up a system whereby it would be able to assure that all their tugs performing this kind of service were adequately equipped. A system in fact was set up of sorts. It was not the most reliable system, however.

Miller reviewed the reports for the radar and he was supposed to report to Loftus, I believe it is, but the reporting was haphazard even by Loftus' own testimony. See his deposition, pages 10 and 20.

Loftus agreed that the age and frequent repairs of radar should lead to its replacement, and I think by his standard, and the standard of the company—and the company was aware of these factors—an old radar, with as many problems as this radar, should have been replaced.

Indeed, Miller assumed, in his deposition, that the radar couldn't have been an 11-year old radar. At page 14 of the deposition he initially indicated that he didn't believe it was the original radar, but later was shown that it was.

The alternative standard that Miller stated on page 17 was far too lax a standard and inappropriate. That is, if there were

repairs in every port. Also, the dollar standard is a questionable one since a set can be rendered inoperative by a relatively cheap problem. The standard that I thought was proper was the one Loftus stated and the one that McNally stated, and that is that when a radar passed its average useful life, if it was having problems and going out of service, it was probably worn out and should be replaced as a matter of course, and where the radar is itself the only piece of navigational equipment that was not related to eyes, eyeballing, or just a compass, it became imperative that the owners saw to it that they had a system that operated to replace such worn-out radar devices.

As I said, I also refuse to limit liability because of inadequate supervision in the emergency. In this connection, the duty of control here is greater than where control is not possible. Here there was no effort to tell the tug how to proceed.

I am not ruling in this case inconsistently with the *U.S. Steel* case that the Moran personnel, including the highly experienced Goodwin, should have interfered with what the tug captain was doing. I think that they made a reasonable judgment not to interfere with the tug captain.

However, I accept the testimony of Santhin that a message should be relayed to the tug captain. Yet, he received a response that indicated that the tug captain did not want to listen to the message because he was too busy dealing with the situation. I think that the Moran personnel, including the vice-president Goodwin, should have insisted on the tug's listening to what the problem was that confronted the dredge, and should have insisted on the captain of the tug addressing himself to the problem that the dredge was in serious trouble and might in fact sink.

I believe that that would have, and certainly could have, led the tug to refrain from resuming the tow and thereby kept the dredge from sinking in deeper water.

The unseaworthiness of both the dredge and the tug were causative factors in bringing about the sinking and the damages involved to the same extent and in the same proportions that I stated earlier. In particular, with respect to the radar, I think counsel correctly argued this morning that the radar might well have been, indeed should have been, useful in avoiding the catastrophy in several ways. Those arguments were on the record, and I accept those arguments.

The distance rings would have told the mate he was not making the course he said he had made. They also would have been more efficient in his looking at everything. The waves might well have obstructed his vision of the buoys. The radar also might have assisted him in ascertaining his position, leading him to keep the dredge out of the area.

The lack of radar was blamed by the reporting personnel from the tug as a cause for the grounding of the tug.

That brings me to the government's claim under the FWPCA.

First, the negligence and the unseaworthiness contributed to the spill to the same extent as the negligence and unseaworthiness of the parties did to the sinking and the loss of the dredge.

Second, Moran is not a third party. I agree with the government in that respect, *United States* against *LeBouef*.

Third, with respect to whether the parties were engaged in wilful negligence, there was no wilful negligence here, at least no such negligence with the parties could be deemed to be privity. Both requirements apply. There has to be wilful negligence and privity, and the arguable wilful negligence in this case was the grounding itself. The navigational errors were so grossly negligent that some court might say that this was wilful negligence under this specific statute.

But that aspect of the causation of this tragedy was out of

the privity of the owner, Moran, and no other aspect of this could be deemed to be wilful.

The Pennsylvania, finally, is not entitled, in my judgment, to set off the expenses that it incurred. I agree with the Steuert case in that regard.

I agree with the reasons given in Steuert, a spiller has obligations to other people to clean up its oil, and if ADC personnel did not go out there and work on the cleanup they might have been responsible to property owners and to the government on other bases, for example for beach pollution. I don't know what kind of additional liability might have befallen then. But I think there is no danger that people in ADC's position are being unfairly treated. They have the responsibility to go out and clean up their spills, irrespective of the funds and the government's right to collect.

So, as I understand it, what happens is the government gets, first of all, Moran's fund. Second, Pennsylvania fund, to the extent that that is necessary. And, third, that Pennsylvania's recovers from Moran that portion of its fund attributable to Moran's fault—that is, 65 percent.

The first moneys the government takes is the Moran fund. I would think that that is correct. If I am wrong in that, you can correct me, but it is $42,150, and then the government takes the rest of its expenses from the Pennsylvania fund, and then the Pennsylvania collects 65 percent of all its expenses relating to the cleanup from Moran.

I would like you to work out the details and propose to me a judgment that incorporates those elements. The parties are to inform the Court by December 1, 1981, whether they can reach agreement on damages.